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IN THE

Supreme Court of the United States

October Term, 1933 No. 101

LAURA ORMSBY AND B. RUSH FIELD, EXECUTORS OF THE ESTATE OF FRANK G. ORMSBY, DECEASED

Petitioners

v.

LOUISE CHASE, BY JESSE BLYTHE, PROCHEIN AMI, AND LOUISE CHASE, IN HER OWN RIGHT.

BRIEF FOR RESPONDENT (PLAINTIFF)

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE SUPREME COURT OF THE UNITED STATES

Laura Ormsby and B. Rush Field, Executors of the Estate of Frank G. Ormsby, deceased
Petitioners,

vs.

Louise Chase, by Jesse Blythe, prochein ami, and Louise Chase in her own right,
Respondent (Plaintiff)

No. 101 Oct. Term, 1933

ARGUMENT FOR RESPONDENT

Louise Chase, the plaintiff, is a resident of St. Louis and was so in 1926. While temporarily living with her mother in a New York apartment house in October, 1925, she was injured in an elevator accident. She alleges that the accident was the result of the negligence of Frank G. Ormsby, the owner of the apartment house. She and her mother entered the elevator from their apartment on the fifth floor of the building on the morning of October 17, 1925. The elevator fell to the basement. The mother of the plaintiff died as a result of the injuries she received. The plaintiff was very seriously injured. She spent a year and a half in hospitals in New York City and in St. Louis and finally lost one of her legs. Shortly after the

accident her father also died. By reason of the fact that she was so terribly injured and was obliged to give all her attention to recovery from her injuries she did not bring any suit immediately after the accident. While she was confined to the hospitals she was completely paralyzed from the waist down for six months. She underwent six operations in New York and two in St. Louis, and the treatment of her spine required the application of special casts which immobilized her entire body for a period of six weeks.

Frank G. Ormsby, the owner of the building, died on June 14, 1926, at Easton Pennsylvania, where he had resided for a period of upwards of twenty years. Miss Chase was seventeen years of age at that time and suit was brought by her next friend in the United States District Court for the Eastern District of Pennsylvania on March 17th, 1927. This suit was brought after she had partially recovered. On the 27th of April, 1927, an appearance was entered for the defendants and an affidavit of defense was filed on the 9th of May, 1927. This affidavit of defense did not raise the legal question now presented to this court in the nature of a statutory demurrer, but the affidavit was a general defense on the merits of the controversy and constituted a general denial of the facts alleged in the statement of claim. In addition to the defense on the merits the affidavit also contained an averment that under the law of New York a right of action against a tort-feasor abates with the death of the alleged tort-feasor. Two years later depositions of witnesses for the plaintiff were taken, under an agreement by counsel, in St. Louis

and the witnesses were examined by counsel for the plaintiff and cross examined by counsel for the defendant.

After two years an attempt was made by counsel for the parties to present the legal question now raised to the learned Judge of the District Court; a stipulation was filed and submitted to him and the question duly argued. The learned Judge, however, was of the opinion that the question could not be disposed of under this stipulation and directed that the case be called for trial and an offer of proof made by the plaintiff which he would overrule and enter a compulsory non-suit. This was done. An appeal was then taken by the plaintiff to the United States Circuit Court of Appeals for the third circuit on the record as it stood and was heard before Judges Buffington, Davis and Thompson, Circuit Judges. The opinion of the court was subsequently filed determining the question which is now presented to this court against the defendant and directing a reversal of the judgment and the granting of a venire facias de novo.

Two questions are, therefore, presented to this court:

First: Could the plaintiff maintain an action against the executors of Ormsby after his death under the law of Pennsylvania?

Second: Did the defendants, by reason of their failure to file a statutory demurrer or to raise the question of law promptly, waive the right to set up the defense that the death of Ormsby abated action against his executors?

I.

THE DEATH OF THE TORT-FEASOR DID NOT TAKE AWAY THE RIGHT TO MAINTAIN THE ACTION IN PENNSYLVANIA

The learned counsel for the petitioner state that it is a settled principle of the conflict of laws that all questions bearing upon the nature and extent of a plaintiff's right to recover damages for a tort are determined solely by the substantive law of the State in which it is created. We do not assent to the correctness of that proposition. On the contrary, we allege that under the decisions of this court and under the repeated decisions in the lower courts contained in the Federal Reporter there is a great contrariety of opinion under the question that is now before the court for consideration. The learned Judge of the District Court, in the opinion which he filed (R. 10) opens his discussion of it with this significant statement:

> "This cause must look for its ruling to the misty subject of the conflict of laws" (R. 10).

The fact is that the learned Judge reached the conclusion that the plaintiff could not recover and that the learned Judges of the Circuit Court of Appeals reached the directly opposite conclusion, saying:

> "All the authorities agree that the survivability of a cause of action is a property right and not a question of procedure. State Legislatures have absolute dominion over the property or estate of dead men and determine what causes of action survive and what abate with their death. Whether or not a cause of action

survives is, therefore, determined by the laws of the State where the action is brought and not by the laws of the State in which the injury was inflicted" (R. 19).

There are a large number of cases both in the United States Courts and in the State Courts relating to the survivability of a pending action. Indeed in most of the cases submitted by both parties to this litigation, the question arises where an action had preceded the death of the defendant. In the present case at the time of the death of Ormsby no action was pending. As already explained, by reason of the plaintiff's injuries she was unable to give any attention or thought to the bringing of an action. If Ormsby was negligent (which for the purpose of this argument must be conceded) the falling of the elevator and the consequent injuries to Miss Chase gave rise to a cause of action.

> "A cause of action has been defined in general terms to be a legal right invaded without justification or sufficient excuse. Upon such invasion a cause of action arises which entitles the party injured to some relief by the application of such remedy as the law may afford. Causes of action are sometimes confounded with remedies, but the cause of action and the remedy sought are entirely different matters." (1 R. C. L., p. 314).

Therefore, on the day of the accident a cause of action was created for the plaintiff against the defendant and it vested in her a property right which could not be taken away except by the intervention of a statute of limitations. The remedy is separate and distinct from the cause of action. In this case

the plaintiff had a choice of remedies. It was either a suit in the State of New York where the injury occurred, or a suit in the State of Pennsylvania where Ormsby had lived for many years and where the bulk of his property existed. The right to bring this transitory action in either State continued to exist unless it was abrogated (7 R. C. L. p. 1058). The plaintiff could, therefore, have begun her suit in Pennsylvania immediately after the accident. The death of Ormsby, nine months later, did not change the vested property right of the plaintiff in the cause of action, nor did it change the principle of law that the assertion of her right by an action was transitory, not local, and could be maintained in another State.

When, therefore, the plaintiff after the death of Ormsby, brought her suit in the United States Court for the Eastern District of Pennsylvania, her rights are to be determined by the laws of Pennsylvania which expressly provide that in case of death of the wrongdoer the personal representatives of the wrongdoer may be made parties defendant in such an action.

As we have already said many of the cases in which this question is discussed arise where an action was pending at the time of the death of the wrongdoer. But, nevertheless, the statement of principle made in these cases often affords some guide toward reaching a solution of the present question.

Section 955 of the Revised Statute of the United States provides for the case of the death of a wrongdoer with an action pending, but is silent upon that question where the suit is not actually pending

at the death (see Title 28 U. S. Code Annotated, Sec. 778).

The Federal Courts have in a number of cases recognized the fact that the survivability of a cause of action or a right of action is dependent upon the law of the forum or the law of the State wherein the action is brought. In 1 Ruling Case Law, page 27, Sec. 20, the principle is thus stated:

> "The survivability of a cause of action is a property right. Federal Courts, therefore, are governed by local State laws as to what causes of action survive and this is because State Legislatures have absolute dominion over the property or estate of dead men and over their affairs in their relation to the living. In determining what causes of action survive at common law, Federal Courts are governed by the law of the State where the action is brought."

The Circuit Court of Appeals upon this point says:

> "In New York the death of Ormsby abated the action but in Pennsylvania it survived. The Act (Penna.) of March 30th, 1921 (P. L. 53 ~~255~~, Sec. 35 (b), provides that 'Executors shall be liable to be sued, either alone or jointly with other defendants, in any such action, except as aforesaid, which might have been maintained against such decedent if he had lived.'"

If Ormsby had lived, undoubtedly this suit might have been brought and maintained against him.

In the case of *Tennessee Coal Co. vs. George*, 233 U. S. 354, a suit was brought by a servant against the master for injuries occasioned by defective machinery. The accident occurred in Alabama but the

suit was brought in Georgia. On this ground the defendant filed a plea in abatement. The plaintiff demurred to the plea in abatement and the Court sustained the demurrer. The Act of Alabama provides that all actions must be brought in a Court of competent jurisdiction within the State of Alabama and not elsewhere. The Court said:

> "Whether the statute be treated as prohibiting certain defenses as removing common law restrictions or as imposing upon the master a new and larger liability, it is in either event evident that the place of bringing the suit is not part of the cause of action. The right and the remedy are not so inseparably united as to make the right depend upon its being enforced in a particular tribunal. The cause of action is transitory and like any other transitory action to be enforced in any Court of competent jurisdiction within the State of Alabama. But the owner of the defective machinery causing the injury may have removed from the state and it would be a deprivation of a fixed right if the plaintiff could not sue the defendant in Alabama because he had left the state nor sue him where the defendant or his property could be found because the statute did not permit a suit elsewhere than in Alabama. The injured plaintiff may likewise have moved from Alabama and for that or other reason may have found it to his interest to bring suit by attachment or in personam in a state other than where the injury was inflicted. The Courts of the sister state trying the case would be bound to give full faith and credit to all those substantial provisions of the statute which inhered in the

cause of action or which named conditions on which the right to sue depend. But venue is no part of the right and a state cannot create a transitory cause of action and at the same time destroy the right to sue on that transitory cause of action in any Court having jurisdiction. That jurisdiction is to be determined by the law of the Court's creation and cannot be defeated by the extraterritorial operation of a statute of another state, even though it created the right of action.

"The case here is controlled by the decision of this Court in Atchison T. & S. F. R. R. vs. Sowers, 213 U. S. 55, where the New Mexico statute giving a right of action for personal injuries and providing that suits should be brought after certain form of notice in a particular district was preceded by the recital that it has become customary for persons claiming damages for personal injuries received in this territory to institute and maintain suits for the recovery, although in other states and territories to the increased cost and annoyance and manifest injury and oppression of the business interests of this territory and the derogation of the dignity of the Courts thereof. Despite this statement of the public policy of the territory the judgment obtained by the plaintiff in Texas was affirmed by this Court in an opinion wherein it was said that where an action is brought in another jurisdiction based upon common law principles although having certain statutory restrictions such as are found in this Act as to the making of an affidavit and limiting the time of prosecuting

the suit, full faith and credit is given to the law and recovery is permitted subject to restrictions upon the right of action imposed in the territory enacting the statute.

"It is claimed, however, that the decision in the Sowers case is not in point because the plaintiff is there seeking to enforce a common law liability while here he is asserting a new and statutory cause of action. But that distinction marks no difference between the two cases because in New Mexico common law liability is statutory liability, the adopting statute provided that the common law as recognized in the United States of America shall be the rule of practice and decision.

"The decision in the Sowers case, however, was not put upon the fact that the suit was based on a common law liability. The Court there announced the general rule that a transitory cause of action can be maintained in another state, even though the statute creating the cause of action provides that the action must be brought in local domestic Courts. In the present case the Georgia Court gave full faith and credit to the Alabama Act and its judgment is affirmed."

In *Atchison, Topeka and Santa Fe R. R. Co. vs. Sowers*, 213 U. S. 55, the Court, speaking by Mr. Justice Day, said:

"An action for personal injuries is universally held to be transitory, and maintainable wherever a Court may be found that has jurisdiction of the parties and subject-matter. Rorer on Interstate Law, 154-155;

McKenna vs. Fisk, 1 Howard, 242; Dennick vs. Central Railroad Company, 103 U. S., 11. Undoubtedly, where the cause of action is created by the State, as is the action to recover for death by wrongful injury; there is no objection to the enforcement of the law because it arose in another jurisdiction. Northern Pacific Railroad Company vs. Babcock, 154 U. S., 190; Stewart vs. Baltimore & Ohio Railroad Company, 168 U. S. 445. In the latter case this Court said: 'As Texas has statutes which give an action for wrongfully causing death, of course there is no general objection of policy to enforcing such a liability there, although it arose in another jurisdiction. But when such a liability is enforced in a jurisdiction foreign to the place of the wrongful act, obviously that does not mean that the act in any degree is subject to the lex fori, with regard to either its quality or its consequences. On the other hand, it equally little means that the law of the place of the act is operative outside its own territory. The theory of the foreign suit is that although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an obligatio, which, like other obligations, follows the person, and may be enforced wherever the person may be found."

In the case of *Dennick vs. Railroad Company*, 103 U. S. 11, the Court said:

"We do not see how the fact that it was a statutory right can vary the principle that a party legally liable in New Jersey cannot escape that liability by going to New York. If the liability to pay money was fixed by the law

of that state where the transaction occurred, is it to be said that it can be enforced nowhere else because it depended upon statute law and not upon common law? It would be a very dangerous doctrine to establish, that in all cases where the several States have substituted the statute for the common law, the liability can be enforced in no other State but that where the statute was enacted and the transaction occurred. The common law never prevailed in Louisiana, and the rights and remedies of her citizens depend upon her civil code. Can these rights be enforced or the wrongs of her citizens be redressed in no other State of the Union? The contrary has been held in many cases."

In *Martin vs. Baltimore & Ohio Railroad*, 151 U. S. 673, the Court, speaking by Mr. Justice Gray, said:

"The question whether a particular cause of action is of a kind that survives for or against the personal representative of a deceased person is a question not of procedure, but of right. As was said by Chief Justice Waite, speaking for this Court: 'The personal representatives of a deceased party to a suit cannot prosecute or defend the suit after his death, unless the cause of action, on account of which the suit was brought, is one that survives by law. Revised Statutes, 955.' The right to proceed against the representatives of a deceased person depends not on forms and modes of proceeding in a suit but on the nature of the cause of action for which the suit is brought. If the cause of action survives, the practice, pleadings

and forms and modes of proceeding in the Courts of the State may be resorted to in the Courts of the United States for the purpose of keeping the suit alive and bring in the proper parties. But if the cause of action dies with the person, the suit abates and cannot be revived. Whether an action survives depends on the substance of the cause of action, not on the forms of proceeding to enforce it. In Re: Schreiber vs. Sharpless, 110 U. S. 76. In that case, the right in question being an action for a penalty under a statute of the United States, the question whether it survived was governed by the laws of the United States. But in the case at bar, the question whether the administrator has a right of action depends on the law of West Virginia, where the action was brought and the administrator appointed."

So, therefore, we say, applying the doctrine of this case to the case at bar, as the law of Pennsylvania gave the right of action against the executor or administrator of the tort-feasor the action can be maintained.

In the case of *Sullivan vs. Associated Billposters*, 6 Federal Reporter (2nd), page 1000, the Circuit Court of Appeals for the Southern District of New York, speaking by Rogers, Circuit Judge, said:

"Sir Frederick Pollock, in his Work on Torts (11th Edition, 61), discussing the effect produced on liability for a death of either the person wronged or the wrongdoer, declares it to be one of 'the least rational parts' of the law. And he also declares that when once the notion of vengeance has been put aside and that

of compensation substituted the rule actio personalis moritur cum persona, seems to be without plausible ground. First as to the liability: it is impossible to see why a wrongdoer's estate should ever be exempted from making satisfaction for his wrongs. It is better that the residuary legatee should be to some extent cut short than the person wronged should be deprived of redress."

The Court further said:

"And for like reason it would seem that the representatives of a deceased person should be liable to answer out of their decedent's estate for the wrongful acts committed by him in his lifetime, whereby another had suffered in his estate, and by which the estate of the wrongdoer had increased the amount of his own estate. Whether or not existing law permits this, and whether upon the facts alleged it appears that the plaintiff's estate was diminished or the defendant's estate increased by his wrongful acts, must now be considered."

The Court, therefore, held that the action could be maintained.

In *Warren vs. Furstenheim*, 35 Federal Rep., 691, the Court said:

"In support of the ruling here made the first essential observation is to note with emphasis the distinction between the abatement of a suit by the death of one or both of the parties to it and the abatement of a cause of action by force of the maxim, actio personalis moritur cum persona. The first is a matter of procedure, purely so; and Congress has made its own rule,

as it may, and by the Practice Conformity Act likewise adopted the State practice where its own legislation does not control. At common law, every suit, whether founded on contract or tort, abated by the death of either party, and could proceed no further. It absolutely perished. One class of English statutes having the force of common law with us abrogated this rule, and allowed the executor or administrator to come in voluntarily or be brought in by scire facias. It was the condition of these statutes that the revival could take place only 'if such action might be originally prosecuted or maintained by or against the executors or administrators of the party dying;' that is to say, provided the cause of action should be affected by the deadly force of the above-mentioned maxim. Now, where or when it was so affected was and is to this day one of the most perplexing subjects with which the Courts have had to deal."

In *Martin vs. Wabash Railroad Company*, 142 Federal Reporter, 650, the Court, speaking by Judge Grosscup, said:

"By the Judiciary Act of 1789, embodied now in the Revised Statutes, it is provided 'that when either of the parties, whether plaintiff or petitioner, or defendant, in any suit in any Court of the United States, dies before final judgment, the executor or administrator of such deceased party may, in case the cause of action survives by law, prosecute or defend such suit to final judgment.'

"Whether a cause of action survives by law

is not a question of procedure, but of right; and is determinable when the action is one arising at common law, not by the law of the State where the injuries were inflicted, but by the law of the State where the action was brought." Baltimore & Ohio R. R. Co. vs. Joy, 173 U. S. 226.

In the case of *Baltimore & Ohio R. R. Co. vs. Joy*, 173 U. S. 226, the Court said:

"Whether a pending action may be revived in a Federal Court upon the death of either party, and proceed to judgment depends primarily upon the laws of the jurisdiction in which the action was commenced, and in the present case is not affected in any degree by the fact that the deceased received his injuries in Indiana. The precise question in this case was 'Does an action pending in the Circuit Court of the United States sitting in Ohio, brought by the injured person as plaintiff to recover damages for injuries sustained by the negligence of the defendant in Indiana, finally abate upon the death of the plaintiff in view of the fact that, had no suit been brought at all, the cause of action would have abated both in Indiana and Ohio, and that even if suit had been brought in Indiana, the action would have abated in that State.'"

The Court further said:

"It is clear that under the statutes of Ohio, as interpreted by the highest Court of that State, the action might have been revived in the State Court in the name of the personal representative of Hervey (the plaintiff and de-

cedent) and proceeded to final judgment. We think that the right to revive attached under local law when Hervey brought his action in the State Court. It was a right of substantial value, and became inseparably connected with the cause of action so far as the laws of Ohio were concerned. Was it lost or destroyed when, upon the petition of the railway company, the case was removed for trial into the Circuit Court of the United States? Was it not rather a right that inhered in the action and accompanied it when in the lifetime of Hervey the Federal Court acquired jurisdiction of the parties and the subject-matter? This last question must receive an affirmative answer."

We submit, therefore, that under all these authorities inasmuch as the cause of action vested in Miss Chase immediately on the happening of the accident and as the law of Pennsylvania provided that in case of the death of either party an action can still be maintained against the personal representatives, this suit was properly brought under the law of Pennsylvania.

Stress is laid by the learned counsel for the petitioner upon a number of cases decided in this Court, which we believe can be readily distinguished from the case at bar. One of these cases is the case of *Davis vs. Mills*, 194 U. S. 451. The plaintiff, a citizen of Montana, brought suit in Connecticut against the directors of a mining company which had failed to file in Montana certain required reports. The law of Montana required that a right of action could only be brought against the directors within three years after the alleged delinquency. In the suit to

enforce liability against the directors, this Court, speaking by Mr. Justice Holmes, said:

> "The general theory on which an action is maintained upon a cause which accrued in another jurisdiction is that the liability is an obligatio, which, having been attached to the person by the law then having that person within its power, will be treated by other countries as accompanying the person when brought before their Courts. But, as the source of the obligation is the foreign law, the defendant, generally speaking, is entitled to the benefit of whatever conditions and limitations the foreign law creates. Slater vs. Mexican National Railroad, 194 U. S. 120. It is true that this general proposition is qualified by the fact that the ordinary limitations of actions are treated as laws of procedure and as belonging to the lex fori, as affecting the remedy only and not the right. But in cases where it has been possible to escape from that qualification by a reasonable distinction Courts have been willing to treat limitations of time as standing like other limitations and cutting down the defendant's liability wherever he is sued. It is merely a ground for saying that the limitation goes to the right created and accompanies the obligation everywhere. In the case at bar the question comes up in the most attenuated form. The law is dealing not with tangible property, but with a cause of action of its own creation. The essential feature of that cause of action is that it is one in the jurisdiction which created it; that it is one elsewhere is a more or less accidental incident."

In the instant case, immediately on the happening of the accident the cause of action arose against Ormsby, a resident of Pennsylvania. That cause of action was transitory and was not given to the plaintiff by statutory enactment as in the case of Davis vs. Mills. It would have been possible to have brought suit either in New York or Pennsylvania immediately. By the law of Pennsylvania this cause of action survived and Ormsby's executors are, therefore, liable for his wrong. It would seem that the ruling of Mr. Justice Holmes does not sustain the position of the appellant. The opinion holds that the law is dealing not with tangible property but with a cause of action of its own creation. In the case at bar we are dealing with a cause of action which is a property right. It is "tangible property." It was not created by the State of New York or by the State of Pennsylvania by statutory enactment but existed and arose immediately upon the fall of the elevator. It vested at once in the plaintiff.

The case cited by Mr. Justice Holmes of *Slater vs. Mexican National Railroad*, 194 U. S. 120, likewise does not sustain the position of the petitioner in this case. By the law of Mexico in a suit for damages by the wife to recover for negligence causing the death of her husband in Mexico, the laws of Mexico provide that in cases of this kind damages should be in the nature of alimony and pensions during necessity or until remarriage. The Court, therefore, held that a verdict for a lump sum apportioned to the several plaintiffs could not be permitted because the law of Mexico would not provide for a lump sum but did provide for the alimony and pensions. It is to be noted also that

Mr. Chief Justice Fuller and Justices Harlan and Peckham filed dissenting opinions in which they held that the verdict could be properly sustained.

Another case relied upon by the petitioner is the case of *Bradford Electric Light Co. vs. Clapper*, 286 U. S. 145. In this case a man employed in Vermont and also in New Hampshire by a manufacturing company tacitly accepted the Vermont Workmen's Compensation Act. He was injured while in New Hampshire performing some duty for the company which employed him, but left no New Hampshire dependents.

In a concurring opinion filed by Mr. Justice Stone he says:

> "It seems unnecessary to decide whether that result could be compelled, against the will of New Hampshire, by the superior force of the full faith and credit clause of the Constitution. If decision of that question could not be avoided, I should hesitate to say that the Constitution projects the authority of the Vermont statute across State lines into New Hampshire, so that the New Hampshire Courts, in fixing the liability of the employer for a tortious act committed within the State, are compelled to apply Vermont law instead of their own. The full faith and credit clause has not hitherto been thought to do more than compel recognition outside the State and of the operation and effect of its laws upon persons and events within it . . .
>
> "It is true that in this case the status of employer and employee, terminable at will, was created by Vermont laws operating upon them while they were within that State. I assume

that the fact of its creation there must be recognized elsewhere, whenever material. But I am not prepared to say that that status, voluntarily continued by employer and employee and given a locus in New Hampshire by their presence within the State, may not be regulated there according to New Hampshire law, or that the legal consequences of acts of the employer or employee there, which grow out of or affect the status in New Hampshire, must, by the mandate of the Constitution, be either defined or controlled in the New Hampshire Courts, by the laws of Vermont rather than of New Hampshire."

We submit that applying the principle enunciated by Mr. Justice Stone in this opinion it is equally true that the authority of New York State should not be projected across the State lines into Pennsylvania.

We say that the legal consequences of the acts of Ormsby in New York (which grow out of or affect the statutes in New York) should neither define or control in the Pennsylvania Courts the right of the plaintiff to recover damage for her injuries.

Another case relied upon is the case of *Orr vs. O'Heron*, 107 Conn., 174. In that case Mr. Justice Wheeler of the Supreme Court of Connecticut said:

"The fallacy of this decision is in its assumption that under the common law of New York the right of action for personal injuries was a substantive right existing wherever a common law right existed which, though abated in the place of the wrong, would still exist in a foreign jurisdiction which had a survival statute, and had obtained jurisdiction of the parties to the action after the abatement of the

action in the State of origin, New York created the right of action for this wrong. The power which gave the right to take it away. When by its law the death of the injured person abated the right of action for this wrong the right no longer existed in that jurisdiction nor thereafter in any other jurisdiction.'"

We assert that there is fallacy in the reasoning of Mr. Justice Wheeler in that it assumes that the State of New York created the right of action. The right of action existed by the common law and was not created by the State of New York or by the State of Pennsylvania. At the time of the accident this right of action existed. It could be asserted in either New York or Pennsylvania. The Connecticut Court goes further and asserts that if suit had been brought in Connecticut and the tort-feasor had died his death would not have affected the action in Connecticut. If, therefore, New York had the right or power to take away the original cause of action it would seem inconsistent to hold that it could not take away the right of action if suit had actually been brought there. But as this case conflicts with the cases which we have already cited, decided in the Federal Courts, we submit that it is not a controlling decision.

Stress is also laid on the case of *Sumner vs. Brown*, 312 Pennsylvania, 124, which is a recent decision. In that case plaintiff was injured in New York as the result of the alleged negligence of a firm, one of the members of which was killed in the accident. Subsequently his surviving partner died. Suit was instituted in the Common Pleas of Pennsylvania against the estate of the surviving partner of the original tort-feasor. A demurrer was

filed to the statement of claim on the ground that the plaintiff had not averred that the law of New York provided for a survival of the common law cause of action.

The precise question raised in the case at bar is not discussed by Mr. Justice Linn. The decision rests upon the question of whether a partnership was a legal entity and it was held that the New York law quoted by the appellant was not sufficient to establish the fact that the law of New York as to partnerships was the same as the law of Pennsylvania. We submit, that this decision is not controlling in the present case.

It is asserted in the argument of counsel for the petitioners on Page 22: "It is conceded in the case at bar that under the law of New York the respondent had no right of action after Ormsby's death" (referring to the record on page 19). We do not make any such concession.

To summarize the result of the authorities which we have cited, we say:

(A) The cause of action arising out of the injury which the plaintiff suffered was a property right which could not be impaired, diminished or extinguished by the death of the tort-feasor.

(B) The right of action being transitory not local, it must be governed by the *lex fori* not by the *lex delicto*.

(C) The obligatio follows the person and may be enforced wherever the person may be found.

(D) As the statute of Pennsylvania expressly provides that in case of the death of the tort-feasor his personal representatives may be made parties

defendant in an action, a suit was, therefore, properly brought in Pennsylvania.

(E) A tort-feasor's estate and property should not be exempt from making satisfaction for his tort. There should be no distinction between his obligation *ex contractu* and *ex delicto*.

II.

THE DEFENDANT WAIVED OBJECTION TO THE ABATEMENT OF THE ACTION BY REASON OF THE DEATH OF THE TORT-FEASOR

This suit was brought as the result of an accident occurring on October 17th, 1925. On the 17th of March, 1927 the action was begun and the statement of the plaintiff's claim was filed. On April 27th, 1927 counsel for the defendant entered appearance. On May 9th, 1927 the defendant filed an affidavit of defense to the merits of the controversy alleging that the defendant's testator had not been guilty of negligence, it also containing a paragraph averring that the right of action against an alleged tort-feasor abates with his death. After a considerable period of time an agreement of counsel was made permitting the defendant to file an amended affidavit of defense. This reiterated the defense relied upon to meet the merits of the case and also averred that any right of action which existed prior to the death of Ormsby abated with his death. On the 18th day of April, 1929 by agreement of counsel depositions were taken in St. Louis on behalf of the plaintiff relating to the merits of the controversy and counsel for the defendant appeared and cross examined the witnesses who were called by

the plaintiff. The issue was therefore joined. Twice the plaintiff came from St. Louis at great expense and had the attendance of her witnesses in Philadelphia for the trial of the case. When finally it was reached for trial and the jury was being selected, the Learned Judge of the Court below having inspected the affidavit of defense discovered the fact that a legal question as to the right of the plaintiff to recover had been raised. This question was not raised however in accordance with the manner required and prescribed by the law of Pennsylvania for the determination of the rights of action grounded in law. The Learned Judge therefore suggested that the jury be dismissed and that a stipulation be filed raising this legal question. Counsel attempted to do this and submitted it to the Court but in the opinion filed it was held that the question had not been properly raised by the stipulation and that a trial must be had. On the trial an offer of proof by the plaintiff was made setting forth the facts which it was proposed to establish (R. 14). This offer was objected to on the ground that the facts offered were immaterial and irrelevant in view of the fact that Ormsby died before any suit was instituted. The Court sustained the objection to the offer, allowed an exception, and granted a compulsory non-suit, which was also excepted to. We assert that this was not the proper method to dispose of the case and that the conduct of the defendant in pleading to the merits and in cross examining the plaintiff's witnesses instead of filing a statutory demurrer to dispose of the question of the abatement of the action must be construed as a waiver of the right to make this defense. We direct the attention of the Court particularly to the affidavit

of defense in which they plead "*that a right of action against an alleged tort-feasor abates with the death of the alleged tort-feasor.*" In the stipulation permitting an amended affidavit of defense to be filed, they again averred that a right of action having existed prior to the death of Ormsby "*abated with his death.*" The affidavit of defense therefore contained a pleading to the merits of the controversy which was a plea in bar and contained a plea in abatement.

The coupling of a plea in bar and a plea in abatement is universally recognized as a waiver of any rights under the plea in abatement.

Section 20 of the Practice Act of 1915, P.L. 483, of Pennsylvania provides that the defendant in the affidavit of defense may raise any question of law without answering the averments of fact in the statement of claim and any question of law so raised may be set down for hearing and disposed of by the Court.

> "As a rule in the absence of a statute to the contrary, where the Court has general jurisdiction of the subject matter, objection to jurisdiction of the person and other objections to the jurisdiction which go merely in abatement must be raised *in limine* by plea or answer to the jurisdiction or in abatement, or by special exception, demurrer, or motion, according to the practice in the particular jurisdiction, and before pleading to the merits or demurring generally, or they will be waived."
>
> 1 *C. J.* p. 37.

In addition to the Act of 1915 the Act of 1925 Pamphlet Laws of Pennsylvania 23 contains the following provision:

"SECTION 1. Be it enacted, etc., That wherever in any proceeding at law or in equity the question of jurisdiction over the defendant *or of the cause of action for which suit is* brought is raised in the Court of first instance, it shall be preliminarily determined by the Court upon the pleadings or with depositions as the case may require; and the decision may be appealed to the Supreme Court or the Superior Court, as in cases of final judgments."

"SECTION 2. All such preliminary questions shall be raised by petition setting forth the facts relied upon, whereupon a rule to show cause shall be granted, and such preliminary question disposed of by the Court. Such procedure shall be deemed *de bene esse* only and shall not operate as a general appearance."

"SECTION 3. The appeal here provided for must be taken and perfected within fifteen days from the date when the decision is rendered; shall be made returnable on the third Monday after it is taken; and shall be placed by the Appellate Court at the head of its argument list for civil cases to be heard at the earliest date consistent with its rules governing the presentation of appeals; Provided, That as to decision made prior to the approval of this act the fifteen days limitation shall not begin to run until after the date of its approval. A failure to appeal within the time specified *will be deemed a waiver of all objections to jurisdiction over the defendant personally.*"

This enactment simply places in statutory form what is the universal rule in all jurisdictions with reference to the pleading, namely; that a plea in

abatement or any preliminary legal question which challenges the right of the plaintiff to maintain his action must be raised and disposed of promptly. There is sound reason for this. It is aptly pointed out in the case of *Daley vs. Iselin*, 212 Pa. 279, at page 286. Judge Mestrezat says:

> "Pleas in abatement should not be regarded with favor, and when a party by entering the plea seeks to oust the jurisdiction of the Court and thereby delay a trial of the cause on its merits, he must confine his action strictly to enforcement of the plea. With that plea upon the record, no further action can be taken in the cause without the defendant's consent until it is disposed of by trial or otherwise. If the plea is sustained, it puts an end to the suit in its incipiency and requires the plaintiff to institute another action, possibly in another form, if he would have the merits of his claim adjudicated. Being a dilatory plea and having the effect of preventing a trial on the merits, it is reasonable and just that he should interpose it and be required to act promptly in having it disposed of, and failing to do so, or if he take any steps looking to a trial of the cause on the merits, he must be held to have waived the right to insist upon his plea and his conditional appearance will become general."

The present case affords a striking illustration of the injustice of a postponed determination of this preliminary legal question. The suit was brought in March, 1927. The issue was joined in May, 1927. In October, 1933, this question is still undetermined. Three times the case has been on the trial list. Twice the plaintiff, a resident of St. Louis, in greatly

straitened circumstances because of the death of her parents (one of whom was killed in this accident) has made the long and expensive journey to Philadelphia and was in attendance with her witnesses. Had the provisions of the Act of 1915 or of 1925 been followed the question now raised could have been disposed of by October, 1927. The plaintiff would not then have been subjected to the expense incident to her attending the trial on the merits.

It may be suggested that the question of waiver would only apply in case of a plea of abatement which was a dilatory plea but in the Act above-quoted, as well as the opinion of the Supreme Court in *Daley vs. Iselin, supra,* it is held that this question of waiver applies equally to an objection to the jurisdiction.

Mr. Justice Mestrezat says:

> "On September 20, the defendant, 'appearing especially and solely to object to the jurisdiction of this Court,' filed a plea to the jurisdiction, setting forth that he was not in Clearfield County at the time of the service of the writ; that he is and was at the time of the service of the writ a citizen and resident of the State of New York; that he has not been engaged in any business in Clearfield County, and that Robinson, on whom the writ was served, at no time was a resident of Clearfield County and had no place of business in that county. On the day after this plea was filed the defendant filed an affidavit of defense, and therein, after reserving his rights under his plea to the jurisdiction, he set up at length a defense to the merits of the plaintiffs claim."

It will, therefore, be seen that in this case, which is a leading case on the question of waiver, it was more than a mere dilatory plea, it challenged the jurisdiction of the Court on the ground that the defendant was not a resident of Pennsylvania, but a resident of New York. Judge Mestrezat applied the doctrine of waiver and held that the question of jurisdiction had been waived by the filing of an affidavit of defense on the merits.

It may be suggested that plaintiff should have moved to have this question determined. The Act of 1925 puts the burden on the defendant. Had the plaintiff attempted to force the determination of the question immediately on the filing of the affidavit of defense, she would thereby have forfeited her right to raise the question which is now raised by her that the defendant by pleading to the merits waived the right to raise the legal question now contended for by the defendant.

Paragraph eleven of the affidavit of defense was a plea in abatement. The Act of 1915 abolished pleas in abatement (R. 7). A cause of action has been defined as:

> "Matter for which an action may be brought; the subject matter of controversy; the subject matter upon which plaintiff grounds his right of recovery; the ground upon which an action may be maintained or sustained (1 C. J. 936)."

The right of action has also been defined as:

> "The right to commence and maintain an action,"

and the phrase is frequently used as synonymous with cause of action, although in some cases it has been distinguished. In the instant case where the

negligence of Ormsby caused the fall of the elevator and the injury to Miss Chase the right of action or the cause of action, or both, existed immediately after the accident. Miss Chase could have brought her action the next day or at any time within the statute of limitations and Ormsby would have had to respond. The right of action was transitory. Ormsby was a resident of the State of Pennsylvania and the fact that he was domiciled in Pennsylvania under our decisions and under our statute gave to Miss Chase the right to bring her action in Pennsylvania. This right of action thus vested in Miss Chase and being transitory did not abate so far as the Courts in Pennsylvania were concerned.

In 1 C. J., page 26, a plea in abatement is defined to be

> "a plea without disputing the justice of the plaintiff's claim, objects to the place, mode or time of asserting it, and requires that, therefore, and *pro hac vice*, judgment be given for the defendant, leaving it open to renew the suit in another place or form, or at another time. At law the abatement of a suit is a complete termination of that particular suit, so that it cannot be revived; but it does not determine or defeat plaintiff's *cause of action* or bar the issuance of a new writ or the institution of a new suit."

Therefore, this cause of action or the right of action which vested in Miss Chas at the time of the accident was not abated or determined by the death of the wrongdoer. The law of New York provides that its process is not available for the enforcement of the right in New York, but this does not mean that this transitory action which could be brought

in Pennsylvania; the domicile of the wrongdoer, abates because of the provision of the law in New York. If the suit had been brought in Pennsylvania prior to the death of Ormsby and had not been reached for trial, his death would not have abated the action.

In the case of *Daley vs. Iselin*, 212 Pa. 279, the Court said:

> "The defendant could have prevented any pleading on the merits subsequent to his dilatory plea until that had been disposed of, if he had so desired. On the other hand, he could unquestionably waive his right to insist on his plea and submit himself to the jurisdiction of the Court. This may be done as effectively by his acts as by his positive agreement, and we think that the defendant's conduct clearly establishes that he did so in this case. On October 1, 1901, the time the plaintiffs made their motion to strike the dilatory plea from the record, the plea of non-assumpsit had been entered and had remained on the record for more than two years with the knowledge of defendant's counsel acquired from the trial lists. This motion should have been allowed had it been made at the time the cause was called for trial on its merits in September, 1900, when the defendant's counsel suggested that the plea in abatement should first be disposed of."

In the case of *Feather vs. Hustead*, 257 ~~285~~ Pa. 357, the Court also said:

> "In the present case both the affidavit which set up the matter in abatement and a general issue plea were filed on the same day. The rule is that a plea in abatement must be entered be-

fore one in bar and that the former fails of effect after the filing of the latter."

In the case of *Fennel vs. Guffey*, 155 Pa. 38, the Court said:

> "If we conceded defendant's position it was too late to take advantage of it after plea pleaded; it was at most a personal exemption and the point should have been raised before trial; by failing to do so he has waived his privilege."

In *Larkin vs. Scranton*, 162 Pa. 289, the Court said:

> "The exception to the jurisdiction raised in the third assignment need not be considered. It comes too late. The city had notice of the appointment of the viewers, of their report, and the plaintiff's appeal and when the issue was framed on the appeal the city pleaded to it without objection . . . the parties by their conduct had waived the right to object that they were not properly before it. The plea in abatement is too late as a plea in bar or to the merits."

In *Boyle vs. Breakwater Co.*, 239 Pa. 577, the Court said:

> "As the record discloses, the rule to suppress the statement was not taken until after the defendant had filed an affidavit of defense to the merits of the claim and a rule had been taken for want of a sufficient affidavit of defense. One who seeks to avail himself of technical objections to pleadings must do so at the earliest opportunity. He cannot be permitted by his pleadings to raise an issue on the merits of the case and thereafter to attack the suffici-

> ency of his opponent's pleadings; and he does so if, without objection, he proceeds to invite the judgment of the Court on the merits of the case. It is well settled that a demurrer and affidavit of defense cannot be filed to a statement of claim at the same time. The filing of the affidavit to the merits is an abandonment of the demurrer."

In *Steel vs. Levy*, 282 Pa. 338, Mr. Justice Simpson said:

> "In answer to the statement defendant filed two papers, both on the same day, (1) a plea in abatement alleging the pendency of another suit for the same cause of action; this was improper as such pleas are expressly abolished by the Practice Act of 1915; and (2) an affidavit of defense and plea in bar in which he presented issues of fact as well as of law, the latter being placed on the allegation that the same causes of action had already been or could have been heard and disposed of in the trial of a previous suit between the same parties in the same Court. Joining the two kinds of defenses was a procedural mistake; only the legal issues should have been advanced in the first instance: Jackson vs. Myers, 260 Pa. 488."

In the case of *Specktor vs. Hanover Insurance Co.*, 295 Pa. 390, Mr. Justice Simpson said, speaking for the Court:

> "With us the later actions of defendant above-stated operate as a waiver of the right to object further to the jurisdiction of the Court over the person of the defendant (Daley vs. Iselin, 212 Pa. 279) and this being so, proceeding to

trial and judgment was not a violation of the due process clause of the 14th amendment to the Constitution of the United States; Western Life Indemnity Co. of Illinois vs. Rupp, 235 U. S. 261. Nevertheless, since there seem to be a multitude of insurance cases growing out of the fire which resulted in this suit, all raising the same issues, we will specifically consider the other points made by defendant.

"In Speektor vs. North British & Mercantile Ins. Co., 293 Pa. 232, where the facts were exactly the same as here, we held that the appeal would have to be quashed because not taken within the time specified in the Act of March 5, 1925, P. L. 23, which requires it to be taken within fifteen days after the ruling complained of, if made subsequent to the passage of the statute, or within fifteen days after its passage, if made before that time, the act further stating that '*a failure to appeal within the time* specified will be deemed a waiver of all objections to jurisdiction over the defendant personally.' We adhere to that ruling; and so doing requires us to hold that defendant, by not appealing until more than four years after the question of jurisdiction was decided against it and more than three and a half years after the passage of the Act, thereby waived the right to further object on that ground."

In *Connaway* ~~vs. Midland Bank~~ Reign of Moscow Bank, 178 U. S. 421, it is said:

"As to the suggestions that the suit was brought in the wrong district that objection, if it could be raised by the company at all, came

after the defendant had pleaded in bar and too late. Citing Texas & Pacific Ry. vs. Saunders, 151 U. S. 105; St. Louis & San Francisco Ry. vs. McBride, 141 U. S. 127; Texas & Pacific Ry. vs. Cox, 145 U. S. 593."

In the case of *Hess v. Conner*, 304 Pa. 74 cited by the learned counsel for the appellee, a partnership bill was filed and the defendant resists on the ground of lack of jurisdiction averring that Letters Testamentary were granted in the State of Florida and that the bill could only be maintained in the Courts of Florida. The Common Pleas of Philadelphia held that it had jurisdiction. The Supreme Court held:

"That defendant having by counsel entered a general appearance, instead of an appearance *de bene esse* as permitted by the Act of March 5, 1925, P. L. 23, her preliminary objections come too late and preclude her from questioning the court's jurisdiction."

The Court further said:

"Moreover, we have held the Act of 1925 applies only to cases where the court is either without jurisdiction over defendant or the cause of action for which suit is brought, and the 'jurisdiction over the cause of action, as that expression is used in the statute, has reference solely to the competency of the particular court to determine controversies of the general class to which the case then presented for consideration belongs.'"

Was the District Court of the United States "competent" to determine the controversy presented for consideration in the instant case insofar as

it was alleged that the cause of action was abated by the death of Ormsby under the law of New York.

Suppose the defendant in this case had presented a petition to his Honor Judge Dickinson under the provisions of the Act of 1925, setting forth that the defendant was advised that under the law of New York the death of Ormsby having intervened, the cause of action was abated and that, therefore, a suit brought in Pennsylvania after the death barred the right of action. Suppose further that Judge Dickinson, having adopted the view which he ultimately took when the question was presented to him, held that the petition was well founded and that the defendant was entitled to judgment. Would not that have been a proper exercise of his "jurisdiction of the cause of action" and would not the District Court have been "competent to determine the controversy thus presented"? We say that he would have had the right to determine that question.

We say that as the court had jurisdiction over this transitory cause of action in the first instance, the death of Ormsby did not destroy that cause of action in Pennsylvania no matter what the law of New York is, and the failure of defendant to have this question decided by the Act of 1925 is a waiver of their right even if it be conceded that the law of New York precludes action in Pennsylvania.

The learned counsel say in reply to this proposition:

> "By the same token it would follow that if the appellee desires to raise the point that the appellant had no cause of action because of her contributory negligence it could only be raised under the petition under the Act of 1925, and

could not properly be set forth in the Affidavit of Defense."

This argument is fallacious. There is no analogy between the two questions. If the plaintiff was guilty of contributory negligence that would be a defense on merits and would require proof. The finding of a jury or the determination of that question by the court if the facts were undisputed, would be essential. It would not take away from the plaintiff the cause of action until it was established by proof that notwithstanding the negligence of the defendant, the plaintiff was also guilty of negligence and thereby forfeit her right of recovery.

We assert, therefore, that the plaintiff has the right to maintain her action and that the entry of the non-suit under the circumstances was error.

Under all these authorities we, therefore, assert that when the statement of claim was filed in this case and served on the defendant and the defendant desired to raise the question as to the right of plaintiff to maintain her action in Pennsylvania, the duty of the defendant was clear. He should have presented a petition in accordance with the provisions of the Act of 1925, which would be in effect a statutory demurrer. The Court could then have disposed of the legal question promptly and without subjecting the plaintiff to the long delay and the expense incident to her coming to Philadelphia twice for the trial of the case. Had the decision of this Court been adverse, an appeal promptly taken would have settled the question now raised finally. Their failure to do so and filing the affidavit of defense disputing the questions of fact, cross examining the witnesses called when the

depositions were taken, and assuming that on the motion for the non-suit they would have cross examined the witnesses for the plaintiff, they thereby waived the right to raise this legal question.

Respectfully submitted,

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